Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

WILLIAM DEWALT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should reconsider *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), and hold that the enhancement of petitioner's sentence from 20 years to a mandatory life sentence based on a prior conviction that was neither charged in the indictment nor proved to the jury beyond a reasonable doubt violated petitioner's rights under the Fifth and Sixth Amendments.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William DeWalt respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. 1a-2a) is unpublished. The United States District Court for the District of Montana did not issue an opinion. Portions of the transcript of the sentencing hearing are reproduced at App. 3a-11a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was issued on February 24, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Sixth Amendments to the United States Constitution are set forth at App. 13a. Relevant portions of 21 U.S.C. § 841, which prescribes penalties for unlawful distribution of controlled substances, are set out at App. 12a-15a. The text of 21 U.S.C. § 851, providing for notice that the government will seek enhancement of a sentence based on a prior conviction, is set out at App. 16a-18a. California Health and Safety Code § 11359, which prescribes punishment for possession of marijuana for sale, is set out at App. 19a.

INTRODUCTION

Petitioner William DeWalt is serving a life sentence without the possibility of parole, rather than the statutory minimum 20 year term, solely because the United States Attorney decided to file a post-indictment notice under 21 U.S.C. § 851 invoking a prior conviction for a low-level drug offense that occurred almost twenty years earlier. The existence of a prior conviction was never suggested to the grand jury, included in the indictment, or proved to the petit jury beyond a reasonable doubt. At sentencing, the district court made clear that, absent the government's decision to submit the Section 851 notification, it would have sentenced DeWalt to the statutory minimum sentence of twenty years.

In *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), a sharply divided Court held that a sentence could be enhanced on the basis of a prior conviction so long as the fact of the conviction was proved to the trial court, at sentencing, by a preponderance of the evidence. Since that time, however, the Court has firmly established that any other fact essential to support a statutory sentence enhancement must be treated as an element of the offense for purposes of the Fifth and Sixth Amendments. *See Apprendi* v. *New Jersey*, 530 U.S. 466 (2000); *Ring* v. *Arizona*, 536 U.S. 584 (2002); *United States* v. *Booker*, 125 S. Ct. 738 (2005). In light of those intervening decisions, the Justice who provided the deciding vote in *Almendarez-Torres* has indicated that the

case should be reconsidered. *Shepard* v. *United States*, 125 S. Ct. 1254, 1264 (2005) (Thomas, J., concurring). That reconsideration should take place before DeWalt—a 47 year-old man—is sent to prison for the rest of his life on the basis of a prior conviction that the government did not allege before the grand jury or prove at trial, and that the sentencing court made clear it would have chosen to ignore.

FACTUAL AND PROCEDURAL BACKGROUND

1. Petitioner William DeWalt is a veteran of the United States Navy who, in 1985, suffered a debilitating workplace injury that left him permanently disabled and in constant pain. As a result of his injuries, DeWalt became unemployed and developed a dependency on pain medication. In 1986, California charged him with possessing a small quantity of marijuana for sale, in violation of California Health & Safety Code § 11359. DeWalt pleaded guilty in exchange for a sentence of time served—approximately 10 days in the local jail.

DeWalt later moved to Montana where, to manage his chronic pain, DeWalt's physician at the local Veterans Administration hospital prescribed methadone pills. By 2002, DeWalt was being prescribed 420 pills each month of the "Methadose" brand of methadone.

On July 20, 2002, Eric Zeigler was found dead in his girlfriend's home in Hamilton, Montana. An autopsy revealed traces of the drug methadone in his system. After a brief investigation, law enforcement officers interviewed DeWalt who candidly admitted having sold Ziegler 20 Methadose pills for $200. DeWalt has never denied having provided Methadose to Ziegler, but he has contested whether the drugs he supplied were the cause of Ziegler's death.

2. a. A grand jury charged DeWalt with distribution of a controlled substance resulting in death, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C), and possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). In plea negotiations, DeWalt indicated that he was prepared to plead guilty to distribution of a con-

trolled substance and to the firearms charge. He contested, however, the government's charge that the Methadose he provided had caused Ziegler's death.

After DeWalt refused to plead to that charge, the United States Attorney filed a notice under 21 U.S.C. § 851 indicating that if DeWalt were convicted, the government would seek enhancement of his sentence based on his 1986 marijuana conviction. That offense, while clearly minor given the 10-day sentence it entailed, was technically a "felony drug offense" for purposes of 21 U.S.C. § 841(b)(1)(C), because the California statute under which DeWalt was convicted does not limit all sentences to one year or less.[1] The facts and circumstances of DeWalt's particular conviction were never presented to the grand jury, alleged in the indictment, or proved to the trial jury.[2]

b. DeWalt was tried and convicted in March 2003. After a lengthy delay caused by litigation over a newly discovered witness—who, had a new trial been granted, would have testified that she had seen Ziegler injecting conventional methadone, rather than Methadose of the sort he re-

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[1] The term "felony drug offense" is defined to include "an offense that is punishable by imprisonment for more than one year under any law of . . . a State . . . that prohibits or restricts conduct relating to . . . marihuana." 21 U.S.C. § 802(44). The California statute under which petitioner pled guilty provides that "Every person who possesses for sale any marijuana, except as otherwise provided by law, shall be punished by imprisonment in the state prison." App. 19a. As a practical matter, however, violators typically receive only probation or a period of imprisonment far less than one year. *See e.g., In re Cohen*, 11 Cal. 3d 416, 417-418, 521 P.2d 477 (1974) (three years of probation and 120 days in custody of sheriff); *In re Resendiz*, 25 Cal. 4th 230, 236, 19 P.3d 1171 (2001) (three years probation and 180 days in jail); *People* v. *Bennett*, 196 Cal. App. 3d 1054, 1055 (Cal. Ct. App. 1987) (three years probation and 90 days in prison); *People* v. *Middlebrook*, 2001 WL 1337584, at *1 (Cal. Ct. App. 2001) (term of probation).

[2] Prior to trial, in order to avoid the prejudice that would result from introducing the fact of the prior conviction to the jury, *see Old Chief* v. *United States*, 519 U.S. 172, 180-181 (1997), trial counsel stipulated to the prior conviction.

ceived from DeWalt, shortly before he died—the district court sentenced DeWalt in March 2004. Because of the government's post-indictment notice under 21 U.S.C. § 851 and the statutory categorization of DeWalt's prior conviction as a "felony drug offense," the government argued that the court must impose a mandatory minimum sentence of life imprisonment under 21 U.S.C. § 841(b)(1)(C). DeWalt argued that imposing a life sentence on that basis would violate his Fifth and Sixth Amendment rights under *Apprendi* v. *New Jersey* and similar cases. App. 5a-7a. The district court rejected that argument on the basis of this Court's decision in *Almendarez-Torres* that different constitutional rules apply to sentence enhancements based on prior convictions. *Id.*

The district court made clear that, absent the government's decision to file the Section 851 information, the court would have sentenced DeWalt to the statutory minimum sentence of 20 years: "I am sure that a life sentence is probably inappropriate. I think the sentencing guidelines and the mandatory minimum sentence that this Congress has enacted, that would have had a mandatory minimum of 20 years, would have been an appropriate sentence in this case." App. 8a-9a. Indeed, the court specifically criticized the government's decision to seek the enhancement:

> I would not have imposed a life sentence if I had the choice. I think that the guidelines and the statutory minimum would have been the appropriate sentence in this case. I am only giving you a life sentence because of a decision made by the United States Attorney. An arbitrary decision, in my view.

App. 10a. In the court's view, giving the government discretion to force an enhanced sentence by deciding to submit the information stripped the court of its proper sentencing authority: "[I]f we're going to sentence somebody and have a meaningful sentencing, it ought not to be, in my view, the United States Attorney [who] decides what the sentence is." App. 3a.

3. The court of appeals affirmed. App. 1a-2a. After rejecting DeWalt's argument that he was entitled to a new trial on the basis of the witness first discovered after trial (App. 2a), the court addressed DeWalt's argument that his sentence was unconstitutionally enhanced on the basis of a prior conviction that was neither included in the indictment nor proved to the trial jury. The court of appeals rejected that argument solely on the basis of *Almendarez-Torres*. *Id.*

REASONS FOR GRANTING THE PETITION

In *Almendarez-Torres* v. *United States*, a divided Court held that a prior conviction could be used to enhance a sentence, even above an otherwise applicable statutory maximum, based only on proof to the judge at sentencing. The majority declared it "absolutely clear" that Congress could "permit judges to increase a sentence in light of recidivism, *or any other factor*," even if the factor was "not set forth in an indictment and proved to a jury beyond a reasonable doubt." 523 U.S. 224, 240 (1998) (emphasis added).

In the intervening seven years, this Court's Fifth and Sixth Amendment jurisprudence has undergone a "watershed change." *Apprendi* v. *New Jersey*, 530 U.S. 466, 524 (2000) (O'Connor, J., dissenting). In *Apprendi*, this Court held that any fact necessary to authorize additional punishment must be charged in an indictment, alleged to the jury, and proved beyond a reasonable doubt. *Id.*. at 490; *see also Jones* v. *United States*, 526 U.S. 227, 252-253 (1999) (Stevens, J., concurring); *id.* at 253 (Scalia, J., concurring); *Ring* v. *Arizona*, 536 U.S. 584 (2002); *Blakely* v. *Washington*, 124 S. Ct. 2531, 2536 (2004); *United States* v. *Booker*, 125 S. Ct. 738, 756 (2005).

While *Apprendi* did not extend its rule to "the fact of a prior conviction," 530 U.S. at 490, because of the prior holding in *Almendarez-Torres*, that holding cannot be reconciled with the *Apprendi* line of cases. Numerous lower courts have recognized the inconsistency, but they are bound to follow *Almendarez-Torres*. Only this Court can overrule it.

This case offers a timely opportunity for the Court to reconsider *Almendarez-Torres*. The question presented is clearly one of substantial public importance, given the high number of offenders whose sentences are enhanced based on prior convictions, the ubiquity of criminal history as a sentencing factor, and the importance of the constitutional rights at stake. No purpose would be served by deferring consideration, because *Almendarez-Torres* clearly controls the issue unless and until it is overruled. And this case is an appropriate vehicle for reconsidering the requirements for proof of a prior conviction, because the trial judge made clear on the record that he would not have imposed a life sentence but for the government's decision to submit a post-indictment information alleging such a conviction.

1. In several recent opinions, this Court has repeatedly called into question the continuing viability of *Almendarez-Torres*. In *Apprendi* itself, the Court characterized *Almendarez-Torres* as "at best an exceptional departure from . . . historic practice." 530 U.S. at 487. It further acknowledged, "[i]t is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested." *Id.* at 489-490. In a footnote, the Court not only endorsed Justice Scalia's dissent in *Almendarez-Torres*, but also went out of its way to advance an independent reason for questioning the prior conviction exception: "the Court's extensive discussion of the term 'sentencing factor' virtually ignored the pedigree of the pleading requirement at issue," namely the rule that an "'indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted.'" *Id.* at 489 n.15 (emphasis added) (quoting *United States* v. *Reese*, 92 U.S. 214, 232-233 (1875) (Clifford, J., dissenting)).

In *Apprendi*, this Court declined to overrule *Almendarez-Torres* for prudential reasons—the statutory enhancement at issue in *Apprendi* was not based on recidivism, *see* 530 U.S. at 489-490 ("Apprendi does not contest the decision's validity and we need not revisit it for purposes of our

decision today"). The *Almendarez-Torres* holding nonetheless has "been eroded..., and a majority of the Court now recognizes that [it] was wrongly decided." *Shepard* v. *United States*, 125 S. Ct. 1254, 1264 (2005) (Thomas, J., concurring) (citing *Almendarez-Torres*, 523 U.S. at 248-249 (Scalia, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting) and *Apprendi*, 530 U.S. at 520-521 (Thomas, J., concurring)).

In *Shepard*, a plurality of this Court consisting of Justices Stevens, Scalia, Ginsburg and Souter, narrowed the scope of the *Almendarez-Torres* exception in order to avoid "serious risks of unconstitutionality." 125 S. Ct. at 1263. Concerned that a wide-ranging judicial enquiry into the disputed generic character of a prior conviction would run afoul of *Apprendi*, Justice Souter interpreted the Armed Career Criminal Act "to limit the scope of judicial factfinding" to facts not "too far removed from the conclusive significance of a prior judicial record." *Id.* at 1262-1263. Although the parties in *Shepard* did not request the Court to reconsider the prior conviction exception altogether, Justice Thomas—who was in the five-Justice majority in *Almendarez-Torres*—noted in a concurring opinion that "in an appropriate case, this Court should consider *Almendarez-Torres*' continuing viability." *Id.* at 1264 (Thomas, J., concurring) (internal quotation omitted).

A number of lower courts also have noted that *Almendarez-Torres* and *Apprendi* cannot be reconciled. *See, e.g.*, *United States* v. *Rodriguez-Montelongo*, 263 F.3d 429, 434 (5th Cir. 2001) ("*Apprendi* cast doubt on the continued validity of *Almendarez-Torres*"); *United States* v. *Davis*, 260 F.3d 965, 969 (8th Cir. 2001) ("A close examination of Supreme Court cases casts further doubt on the future viability of *Almendarez-Torres*."); *Jones* v. *Smith*, 231 F.3d 1227, 1235 (9th Cir. 2000) (stating that *Apprendi* calls *Almendarez-Torres*'s "continuing viability into serious question").

2. Questions concerning the viability of one of this Court's precedents are not tolerable when they pertain to an issue of such substantial importance. At stake in this case

are Fifth and Sixth Amendment rights that this Court has characterized as "constitutional protections of surpassing importance." *Apprendi*, 530 U.S. at 476. As the Court has recently made clear, *Apprendi* and its progeny are animated by a concern to "guarantee a jury standing between a defendant and the power of the state." *Shepard*, 125 S. Ct. at 1262. By requiring that all facts essential to punishment be alleged in an indictment, *Apprendi* ensures that the grand jury, a representative of the community, can protect defendants from overzealous prosecution by "devis[ing] extralegal ways of avoiding a guilty verdict, at least of the more severe form of the offense alleged, if the punishment associated with the offense seemed to them disproportionate to the seriousness of the conduct of the particular defendant." *Apprendi*, 530 U.S. at 479 n.5; *see also United States* v. *Cotton*, 535 U.S. 625, 634 (2002) ("The Fifth Amendment grand jury right serves a vital function in providing for a body of citizens that acts as a check on prosecutorial power."); *Jones*, 526 U.S. at 245; *United States* v. *Mandujano*, 425 U.S. 564, 571 (1976) (plurality opinion) (Burger, C.J.) ("[The] historic office [of the grand jury] has been to prove a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance."); *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962) ("Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.").

Furthermore, the constitutional protection afforded defendants whose sentences may be enhanced based on prior convictions is an issue that affects numerous cases each year. As this Court has noted, "prior commission of a serious crime. . . is as typical a sentencing factor as one might imagine," *Almendarez-Torres*, 523 U.S. at 230. Indeed, at least 57.7% of all federal criminal convictions, and 44.9% of federal

drug convictions in 2003, involved offenders with prior convictions. United States Sentencing Commission, *2003 Sourcebook of Federal Sentencing Statistics* tbls. 21, 37 (summing criminal history categories II-VI). As a consequence, "[i]nnumerable criminal defendants" have been and are being sentenced under the *Almendarez-Torres* rule. *Shepard*, 125 S. Ct. at 1264 (Thomas, J., concurring).

A review of *Almendarez-Torres* should be undertaken promptly. As long as that case remains unexamined by this Court, every sentence enhanced by the fact of a prior conviction will remain under a cloud of constitutional doubt. Moreover, none of the factors that sometimes warrant delaying a grant of certiorari is present here. This Court cannot wait for the issue to "percolate" or for a conflict to develop in the lower courts. It has directed the State and Federal courts to treat its precedents as controlling when they have "direct application," even if they "appear to rest on reasons rejected in some other line of decisions." *Rodriguez de Quijas* v. *Shearson/Am. Express*, 490 U.S. 477, 484 (1989). Courts have followed this directive and thus have treated *Almendarez-Torres* as authoritative despite its having been called into question by this Court's more recent decisions. *See, e.g.*, *United States* v. *Reyes-Maya*, 305 F.3d 362, 365-366 (5th Cir. 2002); *Davis*, 260 F.3d at 969; *United States* v. *Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir. 2000).

3. The doubts articulated by members of this Court and other courts concerning *Almendarez-Torres*'s continuing viability are justified. The fact of prior conviction is not meaningfully different from other facts that are "legally essential to the punishment to be inflicted." *Apprendi*, 530 U.S. at 489 n.15 (quoting *Reese*, 92 U.S. at 232-233 (Clifford, J., dissenting)). The need for a grand jury to serve as "a kind of buffer or referee between the Government and the people," *United States* v. *Williams*, 504 U.S. 36, 47 (1992), is no less urgent when a sentence is enhanced based on the fact of a prior conviction than when a sentence is enhanced based on any other fact. In either case, a defendant can see his "potential sentence balloon" without any "warning in either

his indictment or plea," *Blakely*, 124 S. Ct. at 2542, purely due to a discretionary decision by the prosecutor.

The facts of this case offer an unfortunate demonstration of this point. Relying on 21 U.S.C. § 851, the prosecutor decided entirely on his own to pursue an enhancement from a mandatory sentence of 20 years in prison to a mandatory life sentence based on DeWalt's prior conviction. The grand jury's purpose is to ensure that defendants are treated fairly, by policing prosecutorial discretion of just this sort—discretion that was, in the judgment of the sentencing court, exercised "arbitrar[ily]" in this case (App. 10a), "apparently depend[ing] upon . . . 'What . . . the U.S. Attorney [had] for breakfast'" (App. 5a). The sentencing judge further emphasized, "I would not have imposed a life sentence if I had the choice . . . I am only giving . . . a life sentence because of a decision made by the United States Attorney. An arbitrary decision, in my view" (App. 10a). Thus, this case bears out Justice Scalia's warning that *Almendarez-Torres* is "a grave constitutional error affecting the most fundamental of rights." *Monge* v. *California*, 524 U.S. 721, 741 (1998) (Scalia, J., dissenting).

4. The fact that this case involves an increase in the mandatory minimum rather than an increase in the statutory maximum should not prevent this Court from granting certiorari. This Court has repeatedly held that when a sentencing "range fixed by Congress is so broad, and the enhancing role played by the relevant [sentencing factor is] so significant" that it becomes "'a tail which wags the dog of the substantive offense,'" *Witte* v. *United States*, 515 U.S. 389, 403 (1995) (quoting *McMillan* v. *Pennsylvania*, 477 U.S. 79, 88 (1986)), the factor is functionally equivalent to an element of the offense and thus must be indicted and proved to a jury. *McMillan*, 477 U.S. at 88; *see also Booker*, 125 S. Ct. at 805 (Breyer, J., dissenting); *but see Harris* v. *United States*, 536 U.S. 545, 566 (2002) ("That a fact affects the defendant's sentence, even dramatically so, does not by itself make it an element."). This analysis applies to an increase in a manda-

tory minimum. *McMillan*, 477 U.S. at 88 (applying the test to such a case).

In *Mullaney* v. *Wilbur*, the Court struck down a Maine statute that imposed a mandatory life sentence on any defendant who committed an intentional and unlawful killing unless the defendant proved that he or she acted in the heat of passion. 421 U.S. 684, 700 (1975). A critical factor in the Court's determination that absence of heat of passion was an essential element of the crime of murder was the extent of the increase in the minimum sentence confronting the defendant: He faced "a differential in sentencing ranging from a nominal fine to a mandatory life sentence." *Id.*

In *McMillan*, this Court confirmed that the constitutionality of an increase in a mandatory minimum that depends on an unindicted and unproven fact turns on the extent of the enhancement. In upholding a five-year mandatory minimum based on a fact found by the judge, this Court distinguished *Mullaney* on the ground that the defendant in *McMillan* did not face "a differential in sentencing ranging from a nominal fine to a mandatory life sentence." 477 U.S. at 87 (quoting *Mullaney*, 421 U.S. at 700). In *Harris* v. *United States*, this Court explicitly reaffirmed *McMillan*, while concluding that "[b]asing a 2-year increase in the defendant's minimum sentence on a judicial finding... does not evade the requirements of the Fifth and Sixth Amendments." 536 U.S. at 568. Although the *McMillan* line of analysis was questioned in *Blakely*, 124 S. Ct. at 2539-2540, it has not been overturned, and *Blakely* itself recognized the unfairness of a sentencing regime in which a defendant's potential sentence "balloon[s]... based... on facts [not] proved to his peers." *Id.* at 2542.

The sentencing increase applied to DeWalt is a far cry from "[t]he incremental changes in the minimum—from 5 years, to 7, to 10" that this Court considered and accepted in *Harris*. 536 U.S. at 554. Rather, the increase in the mandatory minimum—here, from 20 years to life in prison—is so large that the enhancement can fairly be said to "alter[] the defendant's punishment in a manner not usually associated

with sentencing factors." *Id.* The bulk of DeWalt's sentence is due not to the substantive offense, but to the prior conviction enhancement—based on an offense to which he pled guilty nearly 20 years ago in exchange for 10 days' time served. Lower courts have held that similarly large increases in mandatory minimums based on sentencing factors run afoul of due process. *See, e.g., United States* v. *Rebmann*, 321 F.3d 540, 544 (6th Cir. 2003) (holding that an increase in the defendant's sentence from 30 months to 20 years runs afoul of due process under *McMillan*); *United States* v. *Kikumura*, 918 F.2d 1084, 1100-1101 (3d Cir. 1990) (finding that an increase in the defendant's sentence from 30 months to 30 years is "perhaps the most dramatic example imaginable of... a tail which wags the dog of the substantive offense." (internal quotation marks omitted)). The massive increase in DeWalt's mandatory minimum sentence makes the recidivism sentencing factor functionally equivalent to an element of the substantive offense. *Apprendi* should therefore apply.

CONCLUSION

This Court should grant DeWalt's petition and issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Alternatively, if the Court is inclined to revisit its decision in *Almendarez-Torres* in another case, petitioner respectfully requests that the Court hold this petition in abeyance until a decision is reached on the merits of that case.

Respectfully submitted,

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MAY 2005

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM DEWALT,
Defendant-Appellant.

No. 04-30107
D.C. No. CR-02-00046-DWM

Submitted: January 10, 2005
[STAMP: FILED Feb. 24, 2005]

MEMORANDUM*

Before: SCHROEDER, Chief Judge, and GRABER, and FISHER, Circuit Judges.

Defendant William DeWalt stands convicted, after a jury trial, of distribution of a controlled substance resulting in death, in violation of 21 U.S.C. § 841(a)(1), and being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). We affirm.

[2] 1. On de novo review, *United States v. Naghani*, 361 F.3d 1255, 1261 (9th Cir.), *cert. denied*, 125 S. Ct. 341 (2004), we hold that the evidence was sufficient to support the conviction under § 841(a)(1). Defendant sold 20 "Methadose" brand methadone pills to the decedent. One Methadose

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

brand pill was found in the decedent's possession at the time of his death, which occurred not long after this sale. The decedent died of a methadone overdose. Although the defense argued that the decedent traded Methadose brand pills with Wiren for "Roxane" brand pills, Wiren denied the trade. A rational finder of fact could find causation beyond a reasonable doubt.

2. We review for abuse of discretion the district court's denial of Defendant's motion for a new trial based on newly discovered evidence. *United States v. Holmes*, 229 F.3d 782, 789 (9th Cir. 2000). We find no abuse of discretion. The district court observed that the witness "did not demonstrate mental clarity or even moderate communication skills" and that her testimony was so subject to impeachment in various respects that it would not have affected the outcome of the trial.

3. On de novo review of the sentencing issue, *United States v. Tighe*, 266 F.3d 1187, 1190 (9th Cir. 2001), we find no error. The holding of *Almendarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998), remains good law even after [3] *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 124 S. Ct. 2531 (2004). *United States v. Quintana-Quintana*, 383 F.3d 1052, 1052-53 (9th Cir. 2004), *cert. denied*, 2005 WL 127012 (U.S. Jan. 24, 2005) (No. 04-7813). In addition, *United States v. Booker*, 125 S. Ct. 738, 755-56 (2005), which applies *Blakely* to the federal Sentencing Guidelines, does not affect the holding in *Almendarez-Torres*.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

WILLIAM DEWALT,
Defendant.

Case No. CR 02-46-M-DWM
Missoula, Montana
Thurs. 03-04-2004
9:49 a.m.

SENTENCING HEARING
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DONALD W. MOLLOY,
UNITED STATES DISTRICT JUDGE

* * * *

[15] Caroll's version of sentence first, evidence later. And if we're going to sentence somebody and have a meaningful sentencing, it ought not to be, in my view, the United States Attorney that decides what the sentence is.

I mean, I just—this one, there's a little bit of a different issue, there's a little bit more proportionality here, in terms of there was a death. And so—but from a structural standpoint, it still seems to me that it's—there may be an issue there that you don't have the protection of the grand jury. This is simply—and it's—if it was mandatory that you make the motion, under 851, that would maybe be a different set of facts.

MR. VAN de WETERING: Right.

THE COURT: But this whole notion of parity in sentencing, it's left to the discretion of the United States Attorney and that could be some person gets sentenced under the guidelines and here everybody gets life in prison. And it seems that defeats the purpose, and all of the arguments that have been made. And they're not indicted. There's no proof.

In fact, even if we had—if he had contested it, it seems to me that there's an issue where this statute—of course, it's all probably moot now, but it says he doesn't have a right to a jury trial. *Apprendi* says he does. And this says quite to the contrary, the recent Supreme Court case that I, as the Judge, have to make the findings of fact and I have to make **[16]** them beyond a reasonable doubt.

Well, it just seems like there might be some structural things there that—from my perspective, this stuff is so inconsistent with the sentencing guidelines and it vests arbitrary authority in the U.S. Attorney's Office that I don't think belongs there.

But apparently that's what's in the law. So if it doesn't belong there, somebody else is going do have to say it.

I am not going to make any kind of adjustment other than to acknowledge, with respect to your first objection, that it is an issue that was raised. But I think in reading the provisions of 21 U.S. Code Section 851, I'm hard-pressed to find out—because there is no requirement of an indictment, and because there was no notice given to the United States Attorney, and because the facts appear to be right. And even if there was the disparate dates, I don't know what the harm is in this case, that had you followed the procedure would not have been remedied prior to the trial in this case.

There might have been a lot of different issues in terms of the structural argument about whether or not you're entitled to a grand jury indictment, whether or not I could sit without a jury. The statute specifically prohibits you from having a jury.

Apprendi—understanding that *Almendarez-Torez* [sic] talks about this issue, but this is a pretty draconian remedy [17] that is left in the hands of the United States Attorney. And from the structural standpoint, that seems very problematic to me. Especially when it is arbitrarily applied. It's like the death penalty; some places it's imposed, some places it's not. And it just apparently depends upon, to use Judge Kozinski's—one of his articles that he wrote in a book called *Judges on Judging, "What did the U.S. Attorney have for breakfast?"* I mean, there's no rational basis for—or no guidelines as to when it should or shouldn't be imposed, other than the issues that have come up in this case.

And, of course, you have somebody here who would not even come close to qualifying as a career criminal offender, whose criminal record is a criminal history category of one.

I don't know. How much time did he do on that sentence?

MR. SISKEL: It was time served.

THE COURT: Which was what?

THE DEFENDANT: Ten days.

THE COURT: So there you go. Somebody who's criminal history reflects that he's done ten days in jail now gets a life sentence at the discretion of the United States Attorney.

As I indicated to Mr. Van de Wetering, there is an element of proportionality here because of the death, that this is a different case than the one we had last week, but it's the [18] same issue. And it's the question of, in my view, we are getting to the point, structurally, that we are getting awfully close to Lewis Caroll's version of the way trials work, and that is the U.S. Attorney says, *Here's what the sentence is and we work at the evidence afterwards.*

This is a meaningless procedure, to have a sentencing hearing when the U.S. attorney is the one that decides what the sentence is. It's meaningless.

So you have another objection?

MR. SISKEL: Well, Your Honor, if I could just speak to—to the last point you raised, which, you know, there is a death involved here and the statute, setting aside this enhancement, provides a minimum 20-year sentence for that. And so I think you're right to point out that the sole reason we're looking at an enhancement from 20 years in prison to a life sentence is only because of this conviction some 18 years ago where Mr. Dewalt served a minimal sentence.

Not trying to belittle what California treats as a criminal offense, but in our sentencing memo we also pointed out that that offense is routinely sentenced to a probation term or time served. And I think there is a very serious structural problem here that so much discretion is given to the prosecutor under 851 and then under the—the drug laws to make a determination about an individual case, whether to seek this enhancement, when it has such drastic consequences. [19] Setting aside the fact that we would be looking at a 20-year sentence here because of the death.

So I would just . . .

THE COURT: Well, you do have guidelines.

MR. SISKEL: Right.

THE COURT: And the guidelines are absolutely meaningless. They came from the Attorney General of the United States that say seek the highest penalty and the highest charge.

MR. SISKEL: Absolutely.

THE COURT: Which means don't exercise your discretion.

Of course, there is, in every criminal justice system, the element of discretion. Who gets investigated, who gets charged, who gets indicted, who gets—and here there is absolutely no discretion if you follow the Attorney General, which apparently is what the guidelines here are, that you charge the highest charge and seek the highest penalty.

What's that got to do with Mr. Dewalt? Has nothing to do with him. It's a political position. But it's being followed.

And I think you may have structural arguments and I—you know, as I—I can make comments about policy. They don't help you at all. Legal arguments, you know, you have to have a good legal argument and I don't know that the way this [20] all plays out, that it's been set up so that there is a legal argument that can be based on this conviction.

Now, there are cases from the United States Supreme Court that say when you get these kinds of enhancements, they can be so disproportionate that they violate the Eighth Amendment. The problem here is the discretion issue when there's a death involved. And I'm not sure that that's a very good argument for you.

But I think we've made the record on that. And you have the objections, which are relatively long.

MR. SISKEL: Well, I would just point out, Your Honor, that the objection to the base offense level of 43 tracks the discussion that we've just had and I don't see any need to repeat it. Although I will just point out that the base offense level does have an impact on the guideline range for the fine that can be imposed. So to the extent that one impacts the other, we would just point out that that may be one area where the Court does have discretion in taking into account the proportionality issue.

THE COURT: Right. I am going to rely upon the base level offense, over your objection, that's set forth in Paragraph 16 as it relates to the drug offense.

MR. SISKEL: Then our next objection has to do with the—on Page 6, Paragraph 18, the four-level reduction for his role as a minimal participant in the crime.

* * * *

[45] So I agree with Mr. Dewalt, that I hope that good will come out of it.

THE COURT: All right. You may approach, Mr. Dewalt.

THE DEFENDANT: (Complying.)

MR. HOOVESTAL: (Complying.)

MR. SISKEL: (Complying.)

THE COURT: William Dewalt, pursuant to the authority vested in me by the Constitution of the United States and pursuant to the laws enacted by the Congress, and a decision made by the United States Attorney for the District of Montana, it's my obligation to impose sentence on you for—and to impose a life sentence.

It is a difficult case in a number of respects. I mean, I hear the argument that the United States Attorney makes, I hear the argument that your lawyers have made. And the reality of it is, is that it's probably something that should be debated in the Congress.

The problem with these sentences is that they're irrational and they make no sense.

As I was thinking further about Mr. Van de Wetering's argument, if you were a Native American and you were drunk driving and you killed Mr. Ziegler because you were drunk driving, you would be looking at a sentence of somewhere between eight and 16 months.

[46] He argues that you should have learned your lesson, and certainly you should have. Whether or not it is a rationalization, a justification, there was an intervening event that occurred with respect to the medications that you received and a change in the law by the Congress which allowed doctors to prescribe methadone in a manner that is uncontrolled. And here, I think, there is ample evidence that—I don't even understand how anybody can take 420 pills a month, for methadone.

In the past, you had to go to a clinic to get a methadone, and it was very regulated. And it was because of whatever reason those policies are changed. So there are lots of reasons that we could argue as to why you get here.

The element of proportionality, because of the death and because of the jury's finding in this case, you'd think that a significant sentence is warranted.

I am not sure that given all of the facts in this case—in fact, I am sure that a life sentence is probably inappropriate.

I think the sentencing guidelines and the mandatory minimum sentence that this Congress has enacted, that would have had a mandatory minimum of 20 years, would have been an appropriate sentence in this case.

But because of the discretion of the United States Attorney, I have nothing to say about it. He has invoked that statute.

[47] That statute is at odds with the concept of the sentencing guidelines, it is at odds with the whole idea of guideline sentencing. It is structurally, in my view, defective because it takes and places an arbitrary decision in the hands of the United States Attorney.

And as is reflected here, you pay dearly for exercising your constitutional right to go to trial and to question the causation issue, which was a very legitimate issue to be raised at trial in this case.

It was tried, the evidence was presented by the United States Attorney's office, the medical and other evidence, which warranted and supports the finding of the jury in the case. Nonetheless, I think a jury could easily have found the other way and it would have been supported also by the evidence, and that is that there was no cause proven beyond a reasonable doubt.

But they were convinced by the evidence. I'm satisfied that it supports their verdict and, consequently, you are punished for going to trial. By being exposed to a life sentence. And that is at odds with the whole idea of sentencing, and guideline sentencing, and the whole idea that the Congress had in terms of mandatory minimum sentences.

We have turned this system upside down. And there is no justification for what you did, there is nothing, as Mr. Van de Wetering says, that justifies the sale. It is [48] foreseeable that somebody will misuse drugs when you sell them or use them.

All that being said, the guidelines and the statutes setting the criteria for sentencing as enacted by the Congress certainly seem to take into account all of the notions of pun-

ishment, proportionality, the preclusion of this kind of behavior on your part in the future, protecting the community, and rehabilitation. And it is striking to me that we have come to the point that you get a life sentence because you didn't accept the plea bargain agreement in the case over a very legitimate issue that had to be tried. So you get punished for exercising your right to go to trial. Which is guaranteed by the Constitution.

Nonetheless, that is what the law is. And until I'm told otherwise—and perhaps it will be in your case. Whether I agree with what the law is or not, I've taken an oath to uphold it. I intend to do that. It's something that we expect of everybody that comes in this courtroom, it's expected of all of us as citizens, and you failed in your end of that bargain and now you will pay the consequences.

Unfortunately, your family will pay, Mr. Ziegler has paid, his family will pay.

Pursuant to the Sentencing Reform Act of 1984, solely because of the judgment of the United States Attorney, the judgment will be entered in this case that William Dewalt [49] be committed to the custody of the Bureau of Prisons for a term of life on Count I and ten years on Count II, to be served concurrently.

I will state for the record, I would not have imposed a life sentence if I had the choice. I think that the guidelines and the statutory minimum would have been the appropriate sentence in this case.

I am only giving you a life sentence because of a decision made by the United States Attorney. An arbitrary decision, in my view.

This sentence reflects the serious nature of the offense, which you've committed, which was the unauthorized distribution of methadone that ended in the death of Eric Ziegler. It's also based upon the prior conviction and the filing of that 851 motion.

You'll be placed at a federal medical center for evaluation for purposes of determining where the Bureau of Prisons will, in fact, have you spend the balance of your life.

Now, in the event that you're ever released from incarceration, you'll be on a term of supervised release for six years on Count I and three years on Count II. Those will run concurrently.

Within 72 hours of your release from custody of the Bureau of Prisons, you will report in person to the probation office in the district to which you're released.

* * * *

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

22 U.S.C. § 841
Prohibited acts

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

* * * *

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use

of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

* * * *

22 U.S.C. § 851
Proceedings to establish prior convictions

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence

(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

Cal. Health & Safety Code § 11359
Possession for sale: punishment

Every person who possesses for sale any marijuana, except as otherwise provided by law, shall be punished by imprisonment in the state prison.

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